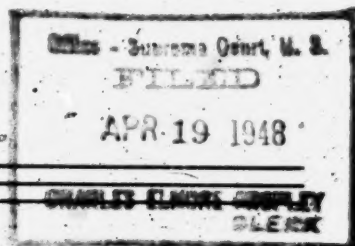




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IN THE  
**Supreme Court of the United States**  
October Term, 1947

No. 533

TORAO TAKAHASHI,

*Petitioner,*

*v.*

FISH AND GAME COMMISSION, LEE F. PAYNE, as  
Chairman thereof, W. B. WILLIAMS, HARVEY E.  
HASTAIN, and WILLIAM SILVA, as members thereof.

**MOTION AND BRIEF FOR THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE AND THE NATIONAL  
LAWYERS GUILD AS *AMICI CURIAE*.**

✓ THURGOOD MARSHALL,

*Counsel for the National Asso-  
ciation for the Advancement of  
Colored People.*

✓ MARIAN WYNN PERRY,

*Counsel for National Lawyers  
Guild.*

EDWARD R. DUDLEY,  
*Of Counsel.*



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**MOTION AND BRIEF FOR THE NATIONAL  
ASSOCIATION FOR THE ADVANCEMENT  
OF COLORED PEOPLE AND THE NATIONAL  
LAWYERS GUILD AS *AMICI CURIAE*.**

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.**

*To the Honorable the Chief Justice of the United States  
and the Associate Justices of the Supreme Court of  
the United States:*

The undersigned, as counsel for and on behalf of the National Association for the Advancement of Colored People, and the National Lawyers Guild, respectfully move that this Honorable Court grant them leave to file the accompany brief as *amici curiae*.

The issue at stake in the above entitled cause is the power of a state to discriminate on racial grounds among persons within its jurisdiction in their exercise of the right to earn a living in a common occupation. The determination of this issue involves an interpretation of the Fourteenth Amendment which will have widespread effect upon the welfare of all minority groups in the United States.

Consent of the parties for the filing of this brief has been obtained for the National Lawyers Guild and has been requested for the NAACP and will be filed as soon as received.

THURGOOD MARSHALL,

*Counsel for the National Association  
for the Advancement of  
Colored People.*

MARIAN WYNN PERRY,

*Counsel for National Lawyers  
Guild.*

EDWARD R. DUDLEY,

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WILLIAMS, HARVEY E. HASTAIN, and  
WILLIAM SILVA, as members thereof.

**BRIEF FOR THE NATIONAL ASSOCIATION FOR  
THE ADVANCEMENT OF COLORED PEOPLE AND  
NATIONAL LAWYERS GUILD AS AMICI CURIAE.**

**Opinion Below.**

**Statute Involved.**

The opinion below and the statute involved are set forth in full in the record and in the Petition for Certiorari filed herein.

### Questions Presented.

1. Whether a statute of the State of California denying to aliens ineligible to citizenship the right to earn their living by commercial fishing is consistent with the Fourteenth Amendment.

2. Whether such statute is an interference with the supremacy of the Federal government in the field of international law and in conflict with treaty obligations of the United States.

### Statement of the Case.

The petitioner herein is a citizen of Japan who, under the naturalization laws of the Federal government, is presently ineligible to citizenship. He has resided in Los Angeles, California, continuously since 1907 with the exception of that period of time when he was excluded from California under the Military Exclusion laws adopted during World War II. From 1915 until the Military Exclusion laws petitioner earned his living by commercial fishing on the high seas off California, which activity was carried on pursuant to a license granted by the Fish and Game Commission of the State of California (R. 1-6).

In 1945, just prior to the restoration of freedom of movement to Japanese aliens who had been excluded from California, the state legislature amended Section 990 of the Fish and Game Code (California Stats. 1945, Ch. 181) to prohibit the issuance of a commercial fishing license to persons ineligible to citizenship or to corporations the majority of whose stockholders, or any of whose officers, were ineligible to citizenship. Upon the face of the statute, no other criterion is applied for the issuance of such licenses.

Upon petitioner's return to California in October, 1945, he found himself, in the last years of his life, excluded from employment as a commercial fisherman after almost thirty years of gainful employment in that field.

The court of original jurisdiction, the Superior Court of the State of California, in and for the County of Los Angeles, found that this statutory restriction was unconstitutional and granted a writ of mandamus (R. 7). On appeal to the Supreme Court of California, the judgment of the lower court was reversed and the constitutionality of the statute was upheld (R. 30-45). Three judges dissented from this holding. The decision of the Supreme Court of California is now before this Court on writ of certiorari.

## **SUMMARY OF ARGUMENT.**

### **I.**

Since there is no rational basis for the discrimination embodied in the statute, it comes into fatal conflict with the Fourteenth Amendment.

### **II.**

State legislation excluding aliens from the right to work is an interference with the national sovereignty.

A. The legislation here presented is an attempt to exclude a class of aliens from residing in the state.

B. The right to exclude aliens is vested solely in the Federal Government.

### **III.**

A state law denying to a racial group the right to engage in a common occupation violates the obligations of the United States under the United Nations Charter.

## ARGUMENT.

### I.

**Since there is no rational basis for the discrimination embodied in the statute, it comes into fatal conflict with the Fourteenth Amendment.**

That this legislation is directed at Japanese aliens is conclusively proven by the 1940 Census figures which show 33,569 Japanese ineligible to citizenship residing in California and fewer than 900 others in the entire continental United States.

Since the adoption of the Fourteenth Amendment this Court has been vigilant in assuring that legislative classification of persons resulting in discrimination should bear a reasonable relationship to the achievement of legitimate ends of government. In a long line of decisions legislation has been declared unconstitutional where classification has been based on race alone.

Considering an ordinance fair on its face, but in practice discriminatory against the Chinese, this Court said of the discrimination:

"No reason for it is shown and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which petitioners belong, and which in the eye of the law is unjustified."

Of similar classification Mr. Justice HOLMES speaking for this Court said:

"States may do a great deal of classifying that it is difficult to believe rational but there are limits,

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*Yick Wo v. Hopkins*, 118 U. S. 356, 374.

and it is . . . clear . . . that color cannot be made the basis of statutory classification.”<sup>2</sup>

The Supreme Court of California justified this legislation as based upon “the broad powers resting in the state in regard to the regulation of its fish and game” (R. 38). In the exercise of that power the court said:

“Obviously if the legislature determines that some reduction in the number of persons eligible to hunt and fish is desirable, it is logical and fair that aliens ineligible to citizenship shall be the first group to be denied the privilege of doing so” (R. 38).

Even assuming, *arguendo*, as the petitioners do not concede, that these fish are the “property” of the state, the issue remains whether the state may condition the granting of licenses solely upon the race of the applicant, without establishing any relationship between the object to be attained, presumably conservation, and the proscribed group.

The criticism of this theory put forth as fair and logical which was made by the dissenting opinion completely exposes its lack of logic:

“I can see no logic in depriving resident aliens, even though they are not eligible to citizenship, of the means of making a livelihood, including the pursuit of commercial fishing. They are lawfully inhabitants and residents of the state. Even if it be assumed that non residents, both alien and citizens of the United States, may be excluded from game and fish on the theory that such resources belong to the people of the state, the fact remains that resident aliens are a part of the people—the inhabitants and

<sup>2</sup> *Nixon v. Herndon*, 273 U. S. 536, 541; See also *Buchanan v. Warley*, 245 U. S. 60; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Yu Cong Eng v. Trinidad*, 271 U. S. 500.

residents of this state. Because some believe that aliens should be punished by such a penalty is no basis for a reasonable classification. There is no sound basis for the argument that because the fish and game belong to the people of the state, the taking of them may be prohibited to all, and that with such a broad power any group of people may be arbitrarily excluded from the right to take any portion thereof. On the basis of that reasoning the Legislature could validly prohibit persons ineligible to citizenship from using the highways. They belong to the state and the traffic hazards would be less if fewer people were using them. The same is true of the use of the parks, schools and other public buildings and places. It could be argued that they are over-crowded and the more people using them the greater the cost to the public, all to the diminishment of the resources of the state natural or otherwise. While the state may withhold a privilege if it elects not to grant it, it cannot arbitrarily prevent any member of the public from exercising it while granting such privilege to others. To conclude otherwise would deprive the equal protection principle of all meaning" (R. 49).

The complete lack of reasonableness of the legislation becomes apparent when one looks to the end which is supposed to be accomplished. There is no limit fixed on the number of licenses which may be issued, nor does the state limit the number of fish to be taken or the period during which fish may be taken. No limits of the size of nets or the equipment used in commercial fishing are established. The licenses are not limited to residents of the state, but persons from throughout the entire country may flock to California, to get licenses and fish without restriction in the coastal waters. For every 100 aliens ineligible to citizenship who are denied commercial fishing licenses, 500 new licensees may come in from every other state or country,

urged on by the thought of a profitable field of endeavor from which skilled workers are now barred by statute. No conservation is achieved.

There being no reasonable relation between the objectives claimed as justification for this statute and the means sought to achieve it, no doubt can be entertained that this legislation like the statute in *Truax v. Raich*<sup>3</sup> is discrimination against a group of unpopular aliens, as such, in competition with citizens. As such it comes into fatal conflict with the Fourteenth Amendment and must fail.

## II.

**State legislation excluding aliens from the right to work is an interference with the national sovereignty.**

The present complicated state of international relations demonstrates the wisdom of the concept that all power in the field of international law, which includes within its scope immigration as well as the power to confer citizenship, must rest wholly in the Federal government. The legislation presented to this Court is an unwarranted and dangerous interference with that power.

**A. The legislation here presented is an attempt to exclude a class of aliens from residing in the state.**

The amendment to the Fish and Game Code prohibiting aliens ineligible to citizenship from engaging in the common occupation of commercial fishing was enacted in 1945 in the midst of an anti-Japanese hysteria on the west coast which exhibited itself in acts of violence which were extended even to honorably discharged veterans who had fought in the American army against the Japanese govern-

<sup>3</sup> 239 U. S. 33.

ment. While on its face this statute makes no mention of race, the dissenting opinion in the court below, viewing the historical background of this legislation and of court decisions on anti-alien legislation in California, found that the law in the instant case is aimed solely at the Japanese (R. 53). See also D. O. McGovney, "Anti-Japanese Land Laws", 35 Cal. Law Review 7, 51. The concurring opinions of Mr. Justice MURPHY and Mr. Justice BLACK in *Oyama v. California*<sup>4</sup> rest in large part upon the fact that legislation against land ownership by aliens ineligible to citizenship in our western states has been "designed to effectuate a purely racial discrimination" . . . "is rooted deeply in racial, economic, and social antagonism" . . . and is the result of "racial hatred and intolerance." Like the Alien Land Law, the California law here under review is designed to "discourage the coming of Japanese into this State."<sup>5</sup>

That the power to exclude aliens from the right to earn their living was also the power to exclude them from entrance and abode was recognized by this Court in *Truax v. Raich*, where it was stated:

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. . . ."

When this fundamental purpose of the law is recognized, it becomes clear that the statute is an interference with the sovereignty of the Federal government in the field of immigration, naturalization, and international law.

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<sup>4</sup> 16 Law Week 4108, — U. S. —

<sup>5</sup> *Estate of Tetsubumi Yano*, 188 Cal. 645.

<sup>6</sup> 239 U. S. 33, 42.

**B. The right to exclude aliens is vested solely in the Federal Government.**

The *Chinese Exclusion Case*<sup>7</sup> established and *United States v. Curtiss Wright*<sup>8</sup> reaffirmed that the investment of the Federal government with the powers of "external sovereignty" in the field of international affairs was "a necessary concomitant of nationality." Indeed, in "The Constitution and World Organization", Professor Corwin has concluded from these cases that in the field of international relations the Federal government does not operate under constitutional restraints.<sup>9</sup> As late as 1945, the law of nations was not viewed as placing any restriction upon the discriminations which a sovereign might practice in establishing tests of undesirability for aliens seeking admission.<sup>10</sup> Thus, the Federal government, and it alone, can admit or exclude aliens, without restriction or limitation under the law today.

Despite the confused state of the law as to citizenship prior to the adoption of the Fourteenth Amendment,<sup>11</sup> today the power to grant or withhold citizenship in our nation is also vested in the Federal government. However, the states continued to vest aliens within their respective boundaries with certain privileges of state citizenship, and it has been said that it was not until 1928 that an election was held in which no alien voted.<sup>12</sup> Their power to do so is not challenged.

<sup>7</sup> 130 U. S. 581.

<sup>8</sup> 299 U. S. 304.

<sup>9</sup> Pp. 6, 19, 29-30. See also M. R. Konvitz, *The Alien and the Asiatic in American Law*, Chapter 1.

<sup>10</sup> C. C. Hyde, *International Law* (2d Ed.) I, 217.

<sup>11</sup> See the opinion of this Court in *Slaughter House Cases*, 83 U. S. 36, where it is stated, at page 73, that prior to 1866: "It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the states composing the Union."

<sup>12</sup> Aylsworth, "The Passing of Alien Suffrage", *Am. Pol. Sci. Rev.* XXV (1931) 114.

But a far different problem is presented when, after the admission of an alien by the Federal government, the state seeks, as here, to place additional and unreasonable burdens upon him. Though the Federal government may be unrestrained by constitutional protections of private rights in determining whether to admit or exclude an alien, once admitted, even though denied national citizenship by Congressional action, the alien is a person clothed with those constitutional guarantees of life, liberty and property and the protection of equal laws which form the basis of a democracy. The states inherit no such unrestricted power in relation to a resident alien as is possessed by the Federal government in regard to an alien seeking entry.

But another and equally serious restriction on the power of states to harry, persecute and, if possible, drive from their border aliens legally admitted to the country, arises from the fact that though we are a federation of sovereign states, the component parts may not isolate themselves and restrict the freedom of persons to establish residence or travel freely in the states.

Such was the reasoning which led this Court to hold unconstitutional an Arizona law restricting the right of aliens to work in common occupations, thereby excluding them from residence. In *Truax v. Raich*, this Court found that the attempt to exclude aliens from residence in certain states by state action would be derogatory of the power of Congress under which those aliens had been lawfully admitted to the country. In that decision, this Court spoke of the right of aliens, without the interference of the states, to enjoy "in their full scope the privileges conferred by admission."

In the words of Mr. Justice CARDOZA, our Constitution was "formed upon the theory that the peoples of the several states must sink or swim together and that in the long run prosperity and salvation are in union and not division."<sup>13</sup>

Attempts by the states to isolate themselves from the economic disasters of other sections of the country by limiting the right of citizens to travel freely within the country have been struck down by this Court as subversive of the welfare of the nation on much the same basis, though reliance was placed on the commerce clause in so doing.<sup>14</sup>

Political and economic reality in a world of shrinking dimensions give added emphasis to the legal requirement that the states of our nation must form a unit for the purpose of determining the right to live within the states, which is, of course, contingent upon the right to earn a living within the states:

The ultimate result of laws such as that here challenged, if valid, would be to vest in the Federal government the right to make only an empty legal determination of the right of an alien to enter the United States while granting to the forty-eight states the power, by forty-eight individual laws, to exclude such persons from the United States. Viewed in that light, the interference with an inherent and necessary power of Federal sovereignty is clear and for that reason alone, this law is invalid.

<sup>13</sup> *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 523.

<sup>14</sup> *Edwards v. California*, 314 U. S. 160.

### III.

**A state law denying to a racial group the right to engage in a common occupation violates the obligations of the United States under the United Nations Charter.**

While the statute on its face purports to have a certain impartiality by describing the proscribed group as "persons ineligible to citizenship," the 1940 Census Report<sup>15</sup> shows only 48,158 aliens ineligible to citizenship in the country, of which 33,569 were Japanese aliens residing in California. By the same census only 853 aliens ineligible to citizenship, other than Japanese, resided in the entire United States. These figures conclusively establish that the legislation before this Court is aimed at one racial or national group and one alone—the Japanese.

Whatever the protections furnished in the Federal Constitution against state legislation unreasonably discriminating on racial or national grounds, it is clear today that the Federal government has pledged itself, with the other members of the United Nations, to fulfill in good faith an obligation to promote "universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."<sup>16</sup>

The United Nations Charter, as a treaty duly executed by the President and ratified by the Senate<sup>17</sup> is declared to be the supreme law of the land by Article VI, Section 2 of the Constitution and any laws of any state to the contrary must fall before this non-discriminatory provision of a treaty obligation.

<sup>15</sup> U. S. Census, 1940, "Characteristics of the Non-White Population," p. 2.

<sup>16</sup> United Nations Charter, Articles 55 and 56.

<sup>17</sup> 51 Stat. 1031.

There can be no doubt that the right to work is one of the fundamental freedoms to which the United Nations Charter refers. It has been so declared by numerous decisions of this Court. As was stated by this Court in *Truax v. Raich, supra*,

"It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the (14th) Amendment to secure."

This principle has been reiterated under many different circumstances, and the right to work has been protected against action only indirectly that of the government.<sup>18</sup>

While the interest of nations in foreign affairs was originally confined to the treatment of their own nationals in other countries, the scope of international negotiations has been constantly broadening. At the close of the First World War treaties signed between many nations provided for the protection of civil rights of national minorities in no way related to the parties signatory. More recently our government included such provisions in treaties of peace with Italy, Bulgaria, Hungary and Roumania.<sup>19</sup> That Japan is not yet a member of the United

<sup>18</sup> See *Allgeyer v. State of Louisiana*, 165 U. S. 589; *Steele v. Louisiana & Nashville R. R. Co.*, 323 U. S. 192.

<sup>19</sup> "Making the Peace Treaties," Dept. of State Publications, 2274, European Series; 16 State Dept. Bulletin 1077, 1080, 1082. See also Resolution No. 51 of the International American Conference on Problems of War and Peace, Mexico City, 1945; Department of State Bulletin No. 4, March 18, 1945, pp. 347-451. See also the Resolution adopted by the Eighth International Conference of American States at Lima, Peru, in 1938, reading in part as follows: "That the democratic conceptions of the state guarantees to all individuals the conditions essential for carrying on their legitimate activities with self-respect." Document on Foreign Policy, Vol. I, 1938-1939, World Peace Foundation, p. 49.

Nations in no way diminishes the obligation of this country to treat Japanese aliens resident here fairly and in a non-discriminatory manner. Our failure to do so has serious implications for world peace.

The passage of such laws as have existed in this country discriminating against the Japanese, including the congressional action depriving them of the possibility of becoming American citizens and their exclusion under the Quota Act, does not pass unnoticed in other nations. Even in 1924 when means of communication were much less developed, word of the Japanese Exclusion Act caused anti-American demonstrations and denunciations of our country in Japan.<sup>20</sup> Today the Japanese press and the press of all nations follow more closely than in 1924 the practices with which we implement our protestations of democratic principles. As was stated by Mr. Dean Acheson on May 8, 1946, when he was Acting Secretary of State:<sup>21</sup>

"the existence of discrimination against minority groups in this country has an adverse effect upon our relations with other countries. We are reminded over and over by some foreign newspapers and spokesmen, that our treatment of various minorities leaves much to be desired. While sometimes these pronouncements are exaggerated and unjustified, they all too frequently point with accuracy to some form of discrimination because of race, creed, color, or national origin. Frequently we find it next to impossible to formulate a satisfactory answer to our critics in other countries; the gap between the things we stand for in principle and the facts of a particular situation may be too wide to be bridged. An atmosphere of suspicion and resentment in a country over

<sup>20</sup> Y. Ichihashi, Japanese in the United States (Stanford University 1932, p. 315).

<sup>21</sup> Final Report, FEPC, June 28, 1946, p. 6.

the way a minority is being treated in the United States is a formidable obstacle to the development of mutual understanding and trust between the two countries. We will have better international relations when these reasons for suspicion and resentment have been removed."

As stated by Mr. Justice BLACK in his concurring opinion in *Oyama v. California*, *supra*:

"How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"

Within the framework of a federal form of government there may be many fields in which the United Nations Charter will require specific enabling legislation before it becomes an effective obligation upon the people of the United States. Yet certain aspects of the Charter are by force of American law sufficiently clear to constitute the supreme law of the land as a self-executing obligation and thus to supersede state laws which violate them.

That the law here presented for review must fall before the supremacy of a treaty obligation of the United States was recognized by the concurring opinion in the *Oyama* case. Indeed, Mr. Justice MURPHY said of the Alien Land Law that it

"does violence to the high ideals of the Constitution of the United States and the Charter of the United Nations . . . Human liberty is in too great a peril today to warrant ignoring that principle in this case. For that reason I believe that the penalty of unconstitutionality should be imposed upon the Alien Land Law."

### ***Conclusion.***

If at other times in our history there were moral grounds for the protection of unpopular minorities, there are today compelling practical reasons for the revitalizing of the practices of democracy within our borders. The statute here challenged not only vitiates constitutional guarantees of personal freedom, but weakens our nation in a field in which the Federal government is supreme. For these reasons it is respectfully submitted that the judgment of the Supreme Court of California be reversed.

Respectfully submitted,

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